indigent patient populations will be particularly targeted for litigation in federal court on theories of state action and violation of civil rights. But no physician sitting on a medical peer review committee can predict which case may result in litigation and must assume that their communications will be disclosed. The net effect of the Ninth Circuit's decision is to undercut the policy of the State of California and eviscerate the promise of confidentiality afforded to medical peer review committees. The state privilege will be rendered meaningless. As this Court noted, "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

Peer review is a chief evaluation function of medical staffs in all 50 states, and each state now affords the reports of peer review committees some degree of protection from disclosure. This Court has held that overwhelming state support should be considered in finding that a federal common law privilege exists. *Jaffee*, 518 U.S. at 13. *Amici* urge this Court to consider the reason and experience of the individual states regarding the issue presented.

3. Lack of Uniformity in Federal Court.

Apart from the debilitating effect of the Ninth Circuit's decision on California law, conflict exists among the federal district and appellate courts. As aptly pointed out by Petitioners, "the matter is not approached uniformly in the federal courts; this is so even though a privilege exists

in almost every state and has strong support in commentary on law." *See* Pet. 6-9.

As a result, differing standards of protection for physicians and medical peer review committees exist depending upon the hospital's geographic location. Fundamental fairness and principles of federalism dictate that hospital staffs throughout the country should not suffer differing burdens imposed by federal law.

IV. CONCLUSION

As argued by Petitioners, and supported by the foregoing additional reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RAYMOND G. FORTNER, JR.
County Counsel
PHILIP S. MILLER
Assistant County Counsel
DORAINE F. MEYER*
Senior Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
500 West Temple Street
Los Angeles, CA 90012
(213) 974-8118

JENNIFER HENNING
CALIFORNIA STATE ASSOCIATION
OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
(916) 327-7535

Attorneys for Amici Curiae

**Counsel of Record*

MOTION FILED
AUG 29 2005

(2)

No. 05-139

IN THE

Supreme Court of the United States

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,

Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,

Respondents.

**On Petition for Writ of Certiorari
to the United StatesCourt of Appeals
for the Ninth Circuit**

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE AMERICAN MEDICAL ASSOCIATION AND THE ARIZONA MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

JACK R. BIERIG*
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603
(312) 853-7000

Counsel for Amici Curiae

August 29, 2005

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 05-139

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,

Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE AMERICAN MEDICAL ASSOCIATION AND THE ARIZONA MEDICAL ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the American Medical Association ("AMA") and the Arizona Medical Association ("ArMA") hereby request leave to file the accompanying brief as *amici curiae* in support of Petitioners. The AMA and ArMA obtained the consent of the Petitioners. Respondents, however, withheld their consent to the filing of a brief by movants.

The AMA and ArMA offer this brief because the issues presented in the petition affect the interests of their member physicians and the patients whom they serve. Specifically,

the question presented by this case – whether to recognize and delimit a federal privilege for medical peer review activities that are protected from discovery by state law – is an issue of recurring importance for physicians and patients. The members of the AMA and ArMA are engaged in peer review activities and in the delivery of health care services to patients on a daily basis. The AMA and ArMA are therefore in a unique position to speak to the important public interests served by maintaining the confidentiality of medical peer review proceedings – and the undermining of such proceedings that is occurring from the refusal of federal courts to recognize a privilege for peer review proceedings conducted in good faith.

The AMA and ArMA have a vital interest in the issue presented in this case, and their views can assist the Court in deciding whether certiorari should be granted. For the foregoing reasons, the Motion of the AMA and ArMA for Leave to File a Brief as *Amici Curiae* in support of Petitioners should be granted.

Respectfully submitted,

JACK R. BIERIG*
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603
(312) 853-7000

Counsel for Amici Curiae

August 29, 2005

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	3
I. CONFIDENTIAL AND PRIVILEGED MEDICAL PEER REVIEW IS THE PRIMARY AND MOST EFFECTIVE MEANS OF ADDRESSING MEDICAL ERRORS AND OF IMPROVING THE QUALITY OF HEALTH CARE	3
II. FORTY-NINE STATE LEGISLATURES AND THE UNITED STATES CONGRESS HAVE RECOGNIZED THE COMPELLING PUBLIC INTEREST IN EFFECTIVE MEDICAL PEER REVIEW AND HAVE ENACTED STATUTES PROVIDING CONFIDENTIALITY AND PRIVILEGE PROTECTIONS	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES — Page

Jaffee v. *Redmonds*, 518 U.S. 1 (1996) 9
McClain v. *College Hosp.*, 492 A.2d 991 (1985) 8
Trammel v. *United States*, 445 U.S. 40 (1980) 9
United States v. *King*, 73 F.R.D. 103 (E.D.N.Y. 1976) 9

STATUTES

42 U.S.C. § 299b-21(7)(A) 9, 10
§ 299b-22(g)(1) 10
§ 299b-24(b)(1)(A) 9
§§ 11101-11152 6
§ 11151(9)-(10) 6
Ariz. Rev. Stat. Ann. § 36-445 8
§ 36-445 *et seq* 2
§ 36-445.01 8
§ 36-2403 ..... 2, 8

LEGISLATIVE HISTORY

S. Rep. No. 108-196 (2003) 10

SCHOLARLY AUTHORITIES

Hall, *Hospital Committee Proceedings and Reports: Their Legal Status*, 1 Am. J.L. & Med. 245 (1975) 5
K. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157 (2002) 5
C. Morter, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?*, 74 Va. L. Rev. 1115 (1988) 4

TABLE OF AUTHORITIES -- continued

Page

J. Pape, Note, *Physician Data Banks: The Public's Right to Know Versus the Physician's Right to Privacy*, 66 Fordham L. Rev. 975 (1997) 4

P. Scibetta, Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review*, 51 U. Pitt. L. Rev. 1025 (1990) 7

OTHER AUTHORITIES

AMA Policy H-375.997, Volunatry Medical Peer Review 3, 4

Common Good, Study No. 15780, *Fear of Litigation Study: The Impact on Medicine* (2002) 5, 6

Institute of Med., *To Err Is Human: Building a Safer Health System* (L. Kohn et al. eds., 2000) 3, 8

Joint Comm'n on the Accreditation of Healthcare Orgs., *2000 Hospital Accreditation Standards* (2000) 8

L. Leape & D. Berwick, *Five Years After To Err Is Human: What Have We Learned?*, 293 JAMA 2384 (2005) 6

Owens, *Peer Review: Is Testifying Worth the Hassle?*, Med. Econ., Aug. 20, 1984 7

INTEREST OF *AMICI CURIAE*

The American Medical Association ("AMA") and the Arizona Medical Association ("ArMA") submit this brief as *amici curiae* in support of Maricopa County's petition for a writ of certiorari.[1]

The AMA, with nearly 250,000 members, is the largest professional association of physicians in the United States. Its members practice in all fields of medical specialization, in Arizona and in every other state of the nation. The objects of the AMA are to promote the science and art of medicine and the betterment of public health.

With nearly 5,000 members, ArMA is the largest professional association of physicians in Arizona. The mission of ArMA is to promote and provide leadership in the art and science of medicine, and to preserve and improve the health of all the people in Arizona by developing and maintaining the highest standards. Both the AMA and ArMA are very concerned about the impact of the decision below on the continuing viability of medical peer review in the United States and the ability of such peer review to uncover and address medical errors that can harm patients, often very seriously.

Amici seek to protect the integrity of medical peer review procedures because these procedures are the primary and

---

[1] *Amici* appear not only on their own behalves but as representatives of the Litigation Center of the American Medical Association and the State Medical Societies ("the Litigation Center"). The Litigation Center is a coalition of the AMA and the state medical societies of every state, plus the Medical Society of the District of Columbia. It was established to represent the views of organized medicine in the courts. The Litigation Center has represented the interests of physicians and of patients in courts around the country.

Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part. The Litigation Center provided the funding for this brief.

most effective means of addressing medical errors and of improving the quality of care provided to patients. The members of the AMA and ArMA are engaged in peer review activities and in the delivery of health care services to patients on a daily basis. *Amici* are therefore in a unique position to speak to the important public interests served by maintaining the confidentiality of medical peer review proceedings – and the undermining of such proceedings that is occurring from the refusal of federal courts to recognize a privilege for peer review proceedings conducted in good faith.

In the decision below, the Ninth Circuit held that there is no federal privilege for a mortality review conducted by the Maricopa County Correctional Health Services – even though such review is protected from disclosure by Arizona law, Ariz. Rev. Stat. § 36-445 *et seq.*, § 36-2403. That decision threatens to compromise the integrity of medical peer review procedures in the Ninth Circuit and in other Circuits which follow its holding. Without confidentiality and privilege protections, physicians cannot be expected to provide frank and critical analysis of the competence and conduct of their colleagues.

Amici do not dispute that the availability of appropriate evidence in civil cases is important. *Amici* contend, however, that the failure of the federal courts to recognize a privilege for medical peer review procedures created by state law undermines the integrity and effectiveness of those procedures. It thereby endangers the public health by compromising efforts to improve quality of care. *Amici* respectfully maintain that the safety of the public is a sufficiently compelling interest to outweigh, in this context, even the need for probative evidence in federal court proceedings.

This issue is a matter of great public importance that warrants review by the Court. *Amici* therefore respectfully urge the Court to grant the petition for a writ of certiorari to consider whether to recognize and delimit a federal privilege

for medical peer review activities that are protected from discovery by state law.

REASONS FOR GRANTING THE PETITION

I. CONFIDENTIAL AND PRIVILEGED MEDICAL PEER REVIEW IS THE PRIMARY AND MOST EFFECTIVE MEANS OF ADDRESSING MEDICAL ERRORS AND OF IMPROVING THE QUALITY OF HEALTH CARE.

Medical errors are an enormously important public policy concern. In its seminal report, *To Err Is Human*, the Institute of Medicine ("IOM") estimated that medical errors are responsible for at least 44,000 and perhaps as many as 98,000 deaths each year. See IOM, *To Err Is Human: Building a Safer Health System* 26 (L. Kohn et al. eds., 2000).[2] According to the IOM, medical errors are thus one of the ten leading causes of death, with the number of deaths in a given year attributable to medical errors exceeding the number attributable to motor vehicle accidents (43,458), breast cancer (42,297), or AIDS (16,516). *Id.* In addition to the staggering number of lives lost due to medical errors, the direct and indirect costs of medical errors are also substantial. The total national costs associated with medical errors is estimated by IOM to be between $37.6 billion and $50 billion per year. *Id.* at 27.

Medical peer review is the primary and most effective means of addressing medical errors and of improving the quality of health care. See AMA Policy H-375.997 (attached as Appendix) ("Peer review should exist to maintain and improve the quality of medical care."). The peer review

---

[2] *Amici* question the methodology that was followed in *To Err Is Human* and therefore do not endorse all of its conclusions. However, there can be no doubt that *To Err Is Human* demonstrates the important federal interest in reducing medical error, and, by general consensus, it is considered the best information available.

process enlists physicians in a collegial process of evaluating, discussing, and critiquing the competence and conduct of their peers in order to identify the root causes of patient morbidity and mortality. If deficiencies in care are discovered, recommendations are made to improve the quality of care and, where appropriate, to modify the scope of the physician's practice. The fundamental purpose of peer review is to educate physicians and thereby improve the practice of medicine, not to assess blame for particular incidents or outcomes. *Id.* ("Peer review should be an educational process for physicians to assure quality medical services.").

Typically, medical staffs of hospitals or other health care facilities establish separate committees to review particular types of cases. Consistent with the educational purposes of medical peer review, the committees are organized in a manner that allows physicians to review cases falling within their specialty or practice areas. The peer review process is uniquely valuable for assessing the quality of care provided by a physician. In fact, the specialized medical knowledge required for accurate judgment of medical care renders other forms of assessment impractical. See C. Morter, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?*, 74 Va. L. Rev. 1115, 1118 (1988). Consequently, commentators have noted that one of the best ways of improving quality of care is to strengthen medical peer review. See J. Pape, Note, *Physician Data Banks: The Public's Right to Know Versus the Physician's Right to Privacy*, 66 Fordham L. Rev. 975, 975 (1997).

Medical peer review can be effective only if physicians engaged in review activities are assured of confidentiality and privilege protections. The essential and most beneficial aspect of medical peer review is the analysis and recommendations that are produced within peer review proceedings. The usefulness of the analysis and of the recommendations is, of course, entirely dependent upon the

willingness of the participants to provide frank, searching, and sometimes critical analysis.

If participants fail to provide this analysis, or if they moderate their comments and recommendations based on influences beyond sound medical judgment, several negative consequences will ensue. Continuing medical errors may not be adequately addressed. The practices of incompetent or impaired physicians may not be appropriately circumscribed. And the quality of care will consequently suffer.

Significantly, the efficacy of medical peer review is blunted when physicians engaged in review activities fear that their identities, comments, records, and recommendations will be disclosed. Indeed, as one commentator has noted, "curtailing the candid deliberations of these committees because of a fear of the discovery process could eventually lead to the destruction of the benefits of committee review." Hall, *Hospital Committee Proceedings and Reports: Their Legal Status*, 1 Am. J. L. & Med. 245, 267 (1975); see also K. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157, 162 (2002) ("The erosion of the medical peer review privilege leaves physicians without adequate assurance of the confidentiality of their participation in peer review activities, thereby undermining the effectiveness of peer review. . . . Ultimately, physicians cannot be expected to participate candidly in peer review or error reporting activities if their identities, comments, records and recommendations are not afforded strict protection.").

Empirical evidence supports the conclusion that disclosure of peer review proceedings in litigation undermines the efficacy of those proceedings. Specifically, a study conducted by Harris Interactive reveals that concern about use of peer review results in litigation is cited by physicians and hospital administrators as the leading factor that discourages medical professionals from openly discussing and thinking of ways to reduce medical errors. See Common Good, Study

No. 15780, *Fear of Litigation Study: The Impact on Medicine* 10 (2002). The same study also revealed that no more than 5% of physicians, nurses, and hospital administrators think that their colleagues are very comfortable discussing medical errors with them. *Id.* See also L. Leape & D. Berwick, *Five Years After To Err Is Human: What Have We Learned?*, 293 JAMA 2384, 2387 (2005) (concluding that fear of medical malpractice liability remains a major impediment to the adoption of "a nonblaming systems-oriented approach to errors," as recommended in *To Err Is Human*).

Physicians are concerned about use of medical peer review results in litigation for several reasons. *First*, physicians fear the personal exposure that may result from participating in peer review proceedings. Personal liability is possible if a physician whose conduct has been criticized brings defamation, discrimination, or antitrust claims against the members of a peer review committee. The possibility of personal liability in these actions is an obvious deterrent to physicians asked to join peer review committees.[3]

Second, physicians are concerned that their analysis of a colleague's conduct may later be used in court against that colleague. The possibility that comments, records, and recommendations will later be used against the physician under review in a malpractice action is an obvious deterrent to providing frank and unrestrained criticism of a colleague. Peer review participants do not wish to become involuntary experts for the plaintiff in a malpractice action. Indeed, if the findings and suggestions of a peer review proceeding may

---

[3] The Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101-11152, protects certain types of peer review activities from liability for damages under federal and state laws. Its scope, however, is limited to actions that challenge loss of clinical privileges or membership in professional societies. *Id.* § 11151(9)-(10). It does not apply to actions, such as in this case, that involve a retrospective evaluation of medical procedures without seeking to affect individual rights.